1979

Breitling Brothers Construction Inc. v. Utah Golden Spikers, Inc. and the State of Utah : Reply Brief of Defendant-Appellant State of Utah

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

BREITLING BROTHERS CONSTRUCTION INC. Plaintiff and Respondent vs. UTAH GOLDEN SPIKERS INC. and THE STATE OF UTAH Defendants and Appellant	)	Case No. 15945

REPLY BRIEF OF DEFENDANT-APPELLANT STATE OF UTAH

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake Co.
Honorable Bryant H. Croft

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vs.	)	Case No. 15945
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Defendants-Appellant	)	

REPLY BRIEF OF DEFENDANT-APPELLANT
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I. There was no contract awarded. One of the primary issues in this lawsuit is whether a "contract was awarded" by the State of Utah to the Golden Spikers, Inc., as contemplated by the bonding statute. Plaintiff's brief does not accurately reflect the record on this important point. On pages 3 and 4 of Plaintiff's Brief, purporting to be a statement of the facts, Plaintiff infers there was a contract entered into between the State of Utah and the Golden Spikers. On page 11 of Plaintiff-Respondent's Brief, he states:

> "Plaintiff-Respondent submits that the facts involved in this case clearly show that the State of Utah awarded to the Golden Spikers a contract to install improvements at the State Fair Grounds..."
>
> "The terms of the agreement between the State of Utah and the Golden Spikers are clearly established by the conduct of the State of Utah and the Memorandum of the Agreement between the State of Utah and the Golden Spikers..."

Again, on page 12 of Plaintiff's brief, Plaintiff claims "...an express agreement was reached between the State of Utah and the Golden Spikers wereby the Golden Spikers were awarded a contract to install the soccer field at the State Fair grounds." Plaintiff's statements are simply not true and are not borne out by the evidence or the Findings of the Court.

a. Exhibit 1-P not admitted as contract binding State.

Exhibit 1-P, which is the unsigned agreement to which Plaintiff refers as setting forth the terms of the agreement was admitted by the Court for a very limited purpose only, in the following terms:

> "The Court: I thought about 1-P during the noon hour. I am going to receive it but not as a contract binding the State to anything. Just as a document prepared during the course of negotiations between the parties here, but for that purpose only. Whatever it does or whatever it shows that is relevant and material to resolving this lawsuit, so be it. I certainly don't think you have established it is a contract signed by the Golden Spikers and the State, but I will receive 1-P for the purpose of showing what has taken place during the negotiations." R.169

b. Findings state lease never agreed to. The Findings of Fact signed by the Judge in pertinent part state:

> "3...Such lease agreement was never agreed to or signed by the Utah Golden Spikers, Inc.
>
> 4. Notwithstanding the lack of a completed lease agreement...
>
> ...A written agreement between the Department of Expositions and the Utah Golden Spikers Inc. was never finalize.

8. Notwithstanding the fact that a written contract had not ever been executed between the Division of Expositions, and the Utah Golden Spikers, Inc. for lease of the Fair grounds,...

9. That after Plaintiff had performed the work at the State Fair grounds several soccer games were played and contract negotiations continued throughout the summer of 1976, between the Division of Expositions and the Utah Golden Spikers, Inc., but a written contract was never finalized..."

The Court did not make a Finding that there was a contract of any kind between the State and the Golden Spikers.

c. Exhibit 1-P shows it was not a final agreement. Exhibit 1-P itself shows it was intended to be signed by both the Budget Officer and the Director of Finance of the State of Utah as absolutely required by the applicable statutes, 63-2-1 and 62-2-2 Utah Code Ann. That neither the Budget Officer nor the Director of Finance signed Exhibit 1-P is obvious from the exhibit itself.

d. Testimony shows no agreement. That the State never reached an oral agreement is clear from the testimony. When asked to identify Exhibit 1-P, Mr. Weilenmann responded:

"Answer: It is a lease agreement that was one of many lease agreements that we talked about entering into, none of which were concluded. R.111

Question by Mr. McLachlin: Now, Mr. Weilenmann, could we characterize these documents as negotiations in preparation of this agreement that you had with the representative of the Golden Spikers.

A. Yes, in preparation for the signing of an acceptable agreement with them. That is not the document you showed me.

Q. Was there another document prepared?

A. Maybe half a dozen or so, none of which was acceptable to them." R.112

And again, on cross examination of Mr. Weilenmann by Mr. Gibbs, referring to about the time when Mr. Weilenmann signed Exhibit 1-P:

"Q. Do you recall having a conversation at the State Fair grounds at or about the time of the signing of that agreement by you, with reference to approval of Exhibit 1-P by the State Board of Examiners?

A. Yes.

Q. Will you tell the Court what that conversation was?

The Court: Well, let's lay the foundation.

Q. Do you recall who was present besides yourself, Mr. Weilenmann?

A. Yes. Representatives of the Golden Spikers, Mr. Bringhurst, myself and I think a representative of the Attorney General's office...

Q. Would you now tell us what the conversation was?

A. Yes, I indicated that neither Mr. Bringhurst nor I have authority to enter into an agreement on behalf of the State of Utah; that was required. That would require the approval of the Board of Examiners. And that is the reason I was concerned about what is number paragraph 32 in the Exhibit; that we already had a contract for the use of the coliseum and that we couldn't enter into another contract until that first contract had been taken care of. Even if when it was taken care of, the Board of Examiners, since it involved an active departure from a normal procedure, would have to be approved by the Board of Examiners.

Q. Did you ever submit Exhibit 1-P or its original to the Board of Examiners?

A. I am unsure as to whether any was submitted. To the best of my knowledge, it was not.

Q. Do you know whether or not the Board of Examiners ever approved the original of Exhibit 1-P?

A. I know the Board of Examiners never approved a contract.

Q. Let me refer you to the next to the last paragraph Exhibit 9, which shows a blank signature line for the Budget officer of the State. Did you ever submit this original 1-P to the Budget office of the State?

A. I never submitted it to anyone.

Q. Let me direct you to the Director of Finance, a blank line also appears for his approving signature. Did you ever submit it to the Director of Finance?

A. It was never submitted to the Director of Finance. It is an incomplete document." R.120

Again, on redirect examination by Mr. McLachlin, Mr. Weilenmann testified as follows:

"Q. Mr. Weilenmann, you have testified that the Board of Examiners needed to approve this agreement?

A. Yes.

Q. Whay is that?

A. Because we had established a rule in the department on the advice of the governor when I first became director of the department, that anytime there was a conflict in terms of contract, and/or in terms of expenditure of funds, that might be required, or the acceptance of funds that were substantial in nature, that the Board of Examiners would approve it.

Q. This was a policy that you had established during your administration?

A. No, it was a policy that Governor Rampton established during his administration. R.121

...

Q. Mr. Weilenmann, do you have any knowledge that the Golden Spikers did not execute this agreement?

A. Yes.

Q. Other than the fact that you have any independent knowledge that they did not execute a copy of this agreement?

A. Yes, because it would have been my responsibility to take the executed copy before the Board of Examiners which was never done.

Q. At least you were never supplied with an executed copy; is that correct?

A. It was my responsibility to take it and I was never supplied with such a copy.

Q. Is that the reason you did not submit this to the Board of Examiners?

A. Yes, because it was never completed.

Q. Had the Golden Spikers signed this agreement, would you have submitted it to the Board of Examiners?

A. If paragraph 32 had been met.

Q. What requirement was there in paragraph 32 that needed to be met before the Golden Spikers signed the agreement?

A. First, Salt Lake City would not renew the business license and, secondly, that the contract in existence with the Fairgrounds Speedway could be settled and done away with. We couldn't lease the property to two people at the same time.

Q. Doesn't paragraph 32 solely shift the burden of any loss resulting from the previous contract to the Golden Spikers?

The Court: You are asking him for a legal conclusion, it seems to me, Mr. McLachlin, and the context of the paragraph speaks for itself as to what it does.

Q. (by Mr. McLachlin) Mr. Weilenmann, as a result of your signing this agreement, the Utah Golden Spikers were permitted to install the soccer field; is that not correct?

A. No.

Q. Why were they permitted to install the soccer field then?

A. Because they had entered on the grounds, destroyed the speedway so the speedway couldn't operate, and counsel advised that we could perhaps negotiate a contract that would be satisfactory.

Q. A contract between whom?

A. A contract between the State of Utah, that is the Board of Examiners, and the Golden Spikers and the elimination of the contract that existed between the speedway people and the State of Utah, which was then in force." R. 122,123

Mr. Bringhurst testified in answer to the questions of Mr. McLachlin with regard to Exhibit 1-P and the execution of an agreement for the Golden Spikers as follows:

"A. Mr. Bringhurst, referring to Exhibit 1-P, does your signature appear on Exhibit 1-P?

A. Yes.

Q. That is your signature on Exhibit 1-P?

A. Yes, that is only half a document, it has never been processed..." R.122

Q. Do you know what Mr. Weilenmann did with the contract?

A. It looks like he signed it.

Q. Do you know what happened to the contract after Mr. Weilenmann signed the contract?

A. No.

Q. Do you know if the contract was ever submitted to the Board of Examiners?

A. No, I am not sure it wasn't. I think if it had of been, it would have been processed to the other process, the Budget Director, the Finance Director and the other things would have been approved first if it had been submitted.

Q. Do you have a copy in your possession that the Golden Spikers signed?

A. No...

Q. Isn't it a fact that the Golden Spikers signed this agreement on March 31, the same time that you signed the agreement?

A. Not to my knowledge."

There was no witness that testified that the Budget Director or the Director of Finance ever signed a contract with the Golden Spikers. No witness ever testified that approval was given by the Board of Examiners as Mr. Weilenmann testified would have to be the case. No one testified that the Golden Spikers ever signed the contract.

On this state of the record, it is outrageous to either infer or claim a contract was entered into between the State and the Golden Spikers.

2. No contract should be "implied in fact."

Plaintiff claims on pages 12 and 13 of his Brief that a contract should be implied in fact because a written agreement was prepared even though not executed by the parties.

a. Conditions precedent not met. As Mr. Weilenmann's testimony shows, he advised the Golden Spiker representatives that any agreement would have to be approved by the Board of Examiners. He made this a "condition precedent" to the agreement to the state becoming bound. It is hornbook law that a condition precedent must be met. See 17 AmJur Contracts §71. The statutory requirements that the Budget Director and the Director of Finance sign the agreement before the State is bound are also conditions precedent which were never met.

b. Contract negotiations continued. Mr. Weilenmann's testimony set out above also shows that contract negotiations continued with the Golden Spikers long after Plaintiff had

completed his work. Such negotiations are inconsistent with Plaintiff's claim that a contract could be implied in fact from the actions of the parties.

c. Statute of Frauds requires writing. Paragraph 19 of Exhibit 1-P which provides for an initial lease term of 5 years, brings the entire lease contract within the purview of the Statute of Frauds, and is therefore required to be in writing. Section 25-5-1,3 UCA 1953.

d. Reason for not submitting to Finance. Plaintiff infers the reason Mr. Weilenmann never presented the contract to either the Budget Director, the Director of Finance, or the Board of Examiners is because he thought the contract was already operative. A much more persuasive reason is that given by Mr. Weilenmann. The Golden Spikers never agreed to or signed the contract and therefore, the contract was not in form to be presented to the Budget Director, the Director of Finance and the Board of Examiners.

e. Request of permission to start. Plaintiff also claims as evidence that a contract existed is the fact the Spikers on or about the day Exhibit 1-P was signed asked Mr. Bringhurst for something in writing so they could begin. Mr. Bringhurst told them "no" he was not authorized to give them that permission. R.158. The only reasonable conclusion is that Mr. Bringhurst at this point in time did not believe there was a contract and could not allow them to proceed until such

time as there was a contract. The fact that the Golden Spikers then immediately directed a contractor to break the fence down and tear up part of the race track without the knowledge of any of the officers of the State should not be held against the State.

f. Rice v Granite case. On page 13 of Plaintiff's Brief, he claims the State is estopped from denying the existence of a contract between the State and the Golden Spikers and in support thereof, cites the case of Rice v Granite School District, 23 Ut.2d 22, 456 P.2d 159 (1969). In the Rice case, the action was for injuries sustained when the Plaintiff, while attending a high school football game, fell from a bleacher claimed to be negligently maintained by the Defendant. Defendant filed a motion to dismiss on the grounds the Plaintiff's claim was barred by the one year limitation period provided in the governmental immunity act. Plaintiff filed an affidavit in opposition to Defendant's motion. The Court treated the matter as a motion for summary judgment and dismissed the complaint with prejudice as not being timely brought. On appeal, the Plaintiff contended that her affidavit contained sufficient facts to create an estoppel which she was entitled to present to the jury. The facts claimed under the estoppel were that the insurance adjuster who represented the insurance company for the high school misled the Plaintiff by advising her she would be compensated for her injury as soon as the costs were

ascertained. The Court held that the insurance carrier held a peculiar status under the governmental immunity act in that an insurance carrier is specifically authorized to approve or deny a claim and therefor the acts of the insurance carrier could bring about an estoppel. The Court cautioned against likening the results of the Rice case to a case like we have presented here, where Mr. Bringhurst or Mr. Weilenmann, as agents for the State, are not authorized by statute to bind the State. The Court makes this distinction in the following language found on page 25:

> "Implicit within the statutory designation of the insurance carrier to deal directly with the claimant is the acknowledgement that the insurance carrier's conduct may be such as to support an estoppel. The insurance carrier is specifically authorized to approve or deny claims; therefore, we are not confronted by a fact situation wherein the agent's actions were not authorized by statute and the governmental entity could not be estopped to assert the statute of limitations."

The inference of the Rice case is that an agent of the State who can bind the State can take the necessary action to create an estoppel. This is consistent with the overwhelming weight of case authority as cited in the State's earlier Brief.

3. More than lease agreement required.

Plaintiff on page 9 of his Brief claims advantage from the fact that the Division of Expositions without approval of the Director of Finance has authority to lease property of the State Fair as provided by 64-4-7.5 UCA 1953. Plaintiff's position is not applicable to his needs nor supported by the facts. As earlier discussed, Mr. Weilenmann made approval of

the Board of Examiners a condition precedent to the State being bound and Exhibit 1-P itself makes clear it was to be signed by both the Budget Director and the Director of Finance and this certainly gave notice of the fact to the Spikers, making this a condition precedent. The evidence also shows without contradiction that the Golden Spikers did not execute the contract. The fact that space was left for the Spikers signature is evidence from which it can be concluded a signature was necessary to manifest the Spikers were bound. Further, the fact that Mr. Weilenmann testified many contract drafts were prepared and negotiated after Exhibit 1-P was signed by Mr. Bringhurst and Mr. Weilenmann shows neither the Spikers nor the State intended to be bound by the terms of Exhibit 1-P as Plaintiff contends.

If Exhibit 1-P is not considered as anything more than a lease agreement as Plaintiff contends, which could be properly executed by the Director of the Division of Expositions without approval of the Director of Finance, where does the "award of a contract for improvements" which gives rise to the application of the bonding statute come from? If Plaintiff views the relationship of the State to the Spikers as one of a lease only, then Plaintiff must look only to the lease interest conveyed to the Golden Spikers onto which he can attach his lien rights. Plaintiff, of course, makes no claim there are any rights presently owned by the Spikers on which he can claim lien rights.

4. Not Attorney General Recommendation.

On page 5, Plaintiff contends that the construction work for installation of the soccer field was allowed to continue on advice from the Attorney General's office. This is an unfair inference from the evidence. Mr. Weilenmann testified that it was the attorney's opinion that a contract could be negotiated, and based on this opinion and "on his own," he determined to allow the work to continue. R.115. Mr. Bringhurst specifically testified that no one from the Attorney General's office recommended that the Golden Spikers be allowed to continue with the improvements or destruction of the grandstand area. R.190.

5. No unauthorized expenditure claim.

Plaintiff makes an interesting, although inconsistent argument on page 15 of his Brief. Plaintiff states:

> "In the instant case, there is absolutely no evidence that the State of Utah was obligated to make expenditures under its agreement with the Golden Spikers. To the contrary, under its agreement with the Golden Spikers, the State of Utah contemplated receiving an income had its venture with the Golden Spikers been successful. The judgment of the trial court does not represent unauthorized expenditures for services and supplies, it represents a liability imposed against the State of Utah as a result of its failure to obtain the delivery of a payment bond from the Golden Spikers as required by Section 14-1-5, Utah Code Ann 1953 as amended."

If there was no "contract for the construction of an improvement" or no "contract amount" in the contract claimed between the State and the Golden Spikers, there is no application of the bond act and no bond required. The bond act is pertinent only as stated

> "Before any contract for the construction...of...any... improvement of the State of Utah...is awarded to any person, he shall furnish to the State of Utah...bonds which shall become binding upon the award of the contract to such person...
>
> (2) A payment bond in an amount to be fixed by the contracting body but in no event less than 50% of the contract amount...provided for in such contract."

Clearly, the contract claimed by Plaintiff represents an expenditure by the State which was neither budgeted or approved as required by law.

6. Quantum Meruit Argument.

Plaintiff cites the case of Wilson v Salt Lake City, 52 Ut.506, 174 P.847 as supporting his position. The Wilson case does not deal with the issues here presented. The legislature has set up exact procedures for expenditure of State funds for improvements such as are claimed here. These include approval of the Budget Officer, the Finance Director and calling for bids. Salt Lake City had no such requirements. This Court has never ruled on the issue presented in this case.

7. Conclusions.

Without supportive Findings or elaborating on the reasons, the trial court found the State liable under the bonding act and for unjust enrichment.

Implicit to liability under the bonding statute is a Finding there was a contract between the State through an authorized agent representing the State, who followed State requirements as the "owner" on the one hand, and the Golden

Spikers as a "contractor" on the other hand, fixing a "contract amount" for construction of the improvements specified, from which contract amount the amount of the bond is fixed. The bonding statute is bottomed on the idea of agreement or contract. Without an agreement or contract, the bonding statute does not apply. No case is cited by Plaintiff finding liability under any bonding statute based on "implied contract" or any of the other equitable estoppel-like remedies. These equitable remedies do not operate through the bonding statute. There is no evidence in this case that an agreement was ever reached so as to bring into play the bonding statute, through which the Plaintiff, who contracted with the Golden Spikers, can indirectly claim liability.

The evidence shows no contract should be implied-in-fact and this claim of Plaintiff should be rejected on the evidence.

Plaintiff's claim of unjust enrichment is not so easily disposed of because this Court has never ruled on the underlying issues of law.

The State submits there are three issues raised in this appeal that this Court should decide.

1. Does a claim for unjust enrichment against the State fall within an exception to the Governmental Immunities Act?

2. Can a claim for unjust enrichment, based on estoppel because of acts of a State employee not authorized to bind the State, supercede the express requirements of 63-2-1, 63-2-2

and 64-1-4, requiring approval by the Budget Officer, the Finance Director and appropriate bidding procedures?

3. If unjust enrichment is allowed, is the measure of damages the benefit to the State or the detriment to the provider?

The answers to these questions are necessary not only to decide this case, but also to determine the action the State should take in other similar actions now pending as a result of the State's involvement with the Golden Spikers.

The State submits that for the reasons given in its first brief and in harmony with the overwhelming majority of American Courts who have considered these issues, the Trial Court should be reversed. If the Plaintiff wishes to recapture his fill material and top soil, the State has no objection.

Respectfully submitted,

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Special Assistant Attorney General
Attorney for Defendant-Appellant
State of Utah

MAILING CERTIFICATE

I hereby certify that I mailed two copies of Defendant-Appellant's Reply Brief to Mr. Mark C. McLachlan, attorney for Plaintiff-Respondent, 343 South 4th East, Salt Lake City, Utah 84111 this 2nd day of April, 1979.

Ruth J. Martin